IN THE

Supreme Court of the United States

No.....

G. T. FOGLE & COMPANY, A CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION.

THE FACTS.

Petitioner relies upon the facts as set out in the statement of the case in the petition, and as being agreed by both respondent and the appellate court to be undisputed, and all of them shown by documentary evidence. A further statement of facts in the brief will not be made except where deemed necessary to the argument upon the law.

DESIGNATION OF PARTIES AND COURTS.

For convenience and brevity, the parties to the case and courts and bodies involved will be given the same designations in the brief as in the petition.

ARGUMENT.

I.

In Contract No. 1 there is a necessarily implied promise by the Government to use the mixer, as much a part of the contract as if expressed in words, and indispensable to effectuate the intention of the parties, arising from the language of the contract and the circumstances in which it was made.

By this contract, in the form of an invitation to bid, plaintiff rented to the Government the services of a concrete mixer for 100 use hours—not 100 hours, more or less—, at the rental price of seventy-five cents per hour, and a total rental of $75.00. The invitation, sent by circular letter to nineteen dealers in such equipment, was as follows:

"Rental 7 cu. ft. or 1 bag concrete mixer 100 hours. Quantity, 1, Unit, hr. Unit Price Per hr."

Plaintiff, looking to Form S. P. O. No. 7, attached to and made part of the contract, and adapting its bid to Par. 1 of this form, bid as follows:

"1 bag "Jaeger" concrete mixer, gasoline motor, self-loading, *lessee* "to furnish fuel, grease, oil and operator or operators therefor", Seventy-five (75) cents per hr."

Plaintiff promptly delivered the mixer to the street project at West Hamlin, fifty miles from its plant site, at its expense, and in all respects complied with the contract on its part, as expressed in the typewritten contract and the conditions of the Form S. P. O. No. 7 made a part of it. The equipment was held on the work for more than four months following its delivery, without payment of any rental to plaintiff, or notice that it was not being used, before plaintiff was informed by letter

from the construction supervisor of the work that the engineers had been unable to use it due to adverse weather conditions, and that it would not be needed for about sixty days, and that plaintiff might remove it, and would be compensated for the transportation cost of removal. The statement that "adverse weather conditions" had prevented its use was knowingly false, weather conditions for concrete construction having been almost perfect, the thereafter admitted fact being that it never had been needed on the project, had been requisitioned in error in the first instance, and of course had never been actually used. The trial court, looking only to a part of Paragraph 5 of Form S. P. O. No. 7, held, applying its holding as to this contract as well to the two others in suit, that as this paragraph provided that rental would be paid only for the actual operating time of the equipment, and the Government had not operated it, it had received no benefit under the contracts, and was not liable thereon; and the appellate court, looking solely to the same paragraph excerpt, held as to all three contracts that the Government did not rent any of the equipment, and did not promise, expressly or by implication, to use it; but that plaintiff, by this paragraph, expressly and explicitly bound itself to deliver the equipment to the Government, at its own expense, and give the Government the right to use it, and pay for it only when and to the extent used; the Government being under no duty to use it, and plaintiff assuming the risk of delivering and furnishing equipment which might never be used;—in plain words, that all three contracts were merely options, given to the Government not only without any beneficial consideration to plaintiff, but at the risk of its great detriment, and by which the Government was not only not bound to anything, but expressly relieved from any obligation to

plaintiff. Upon this intrinsic construction of the contracts the judgment of the trial court was affirmed. The first question presented is whether this construction of Contract No. 1, predicated upon the one isolated, printed provision of the contract, standing alone, is tenable under the settled rules of construction applicable thereto, and particularly under the complementary rules that the contract must be "taken by the four corners" and read as a whole, and each provision thereof given effect, in order to arrive at the intention of the parties; and that when so read, if that intention cannot be effected without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied. It is only in the construction of Contract No. 1 that the question of a necessarily implied promise arises; and it arises there, not because the language of the contract leaves the meaning of the parties in doubt, but for the precisely opposite reason—because that language shows so clearly that the object and purpose of neither party to the contract can be attained unless the promise of the Government to operate the mixer 100 hours, and pay $75.00 for its use, is implied and a part of the instrument. Reading the contract as a whole, the sole object and purpose of the Government in entering into it is to rent a mixer for 100 hours use in the construction of a street project at West Hamlin, have it delivered there immediately—the contract provides, "Delivery required immediately"—, and operate it in the due course of its project construction, and from day to day, a total of 100 hours; its engineers on the project having estimated beforehand that the mixer work there could be done with 100 hours use of it, but the contract providing, in Paragraph 6 of Form S. P. O. No. 7, that in case it cannot the Government shall have the option to extend the rental period for thirty days, or any part

thereof, and make further use of the mixer, at the rental rate of seventy-five cents per hour, until its part of the work is completed. R. 8. The sole object and purpose of plaintiff in entering into the contract is to earn the $75.00 rental for its mixer; this is the sole consideration moving to it under the contract, and unless the Government does operate the mixer for the full 100 hours, and pay $75.00 for its services, plaintiff's consideration fails. Thus the implied promise to operate the mixer necessarily arises from the express promise of the Government to pay the $75.00 rent. This implied promise on its part is shown with special clarity by the language of the pertinent paragraphs of Form S. P. O. No. 7, "Standard Conditions of Equipment Rental" (R. 7), referring to plaintiff as "the bidder", and to the United States as "the Government". First (Par. 1), the mixer was to be delivered on the designated project at West Hamlin, and returned to the bidder's plant site at St. Albans, by the bidder, without additional expense to the Government; *i. e.*, the rental of seventy-five cents per hour to be paid for its use covered its transportation cost both ways. If the mixer was not to be *used* at West Hamlin, why require its delivery—and, under the contract, its "immediate delivery"—, there? And if not used, where was the bidder to get his transportation cost?

Second (Par. 2), the bidder was required to guarantee, and did guarantee, by its bid, that the mixer, when delivered on the project, was in first class condition,—meaning, of course, first class mechanical condition for operation on the work. If it was not to be *used*, what difference did it make to the Government whether its mechanical condition was good or bad?

Third (Par. 5): Payment of rental was to be made only for the actual operating time of the mixer, such

operating time to be determined by the proper administrative officer of the Government. If the mixer was not to be *used,* how could there be any operating time to be kept by the Government's officer, and paid for by it?

Fourth (Par. 6): "If the work in connection with which *the equipment is to be used*" was not completed at the expiration of the rental period (100 use hours), the Government had the option to extend such period for thirty (30) days, or any part thereof, at the rental rate agreed upon for the initial period. If the mixer was not *used,* how could the work ever be completed?

Fifth (Par. 7): The bidder was to bear all expenses incident to the maintenance and repair of the mixer, and for depreciation or wear and tear *"resulting from the operation thereof."* If the Government did not bind itself to use the mixer, why bind the bidder, at the bidder's expense, to maintain and repair it against depreciation or wear and tear *resulting from its use?* For, obviously, if the mixer was not operated there would be no wear and tear or depreciation of it, hence no maintenance or repair would be necessary.

Sixth (Par. 8): The bidder was bound to keep the mixer on the job, *"available for use",* for the full rental period,—in this case for an indefinite period during which it was to be operated a total of 100 hours. If the Government did not bind itself to operate the mixer, within this indefinite period, a total of 100 use hours, why bind the bidder to keep it on the job *available for use* until its 100 hours had been worked out?

Seventh (Par. 9 and 10): The bidder was bound to deliver on the job a mixer in satisfactory mechanical condition; if it was not so the supervisor on the job could

reject it, and require the bidder to furnish a substitute satisfactory to him; upon the bidder's failure to do which the Government had the right to procure wherever it could another and substitute mixer, and make the bidder responsible for any excess cost of such substitute beyond the bidder's contract price—, in other words, hold the bidder responsible in damages for its breach of contract. Again, if the Government did not bind itself to use the mixer why was its mecahnical condition material? And if the Government had the right, under the contract, to hold the bidder responsible in damages for failure to furnish it a mixer in satisfactory mechanical condition for use, would not the bidder, after furnishing the Government a mixer in satisfactory mechanical condition, approved by the supervisor on the job, have the reciprocal right to sue the Government for damages for its failure to use the mixer, and for its use pay the bidder the agreed consideration, and the only consideration, moving to it for the performance of its contract?

Finally, what does the Government expressly bind itself to do under the contract? Just one thing,—to pay the bidder, to cover its transportation expense, its maintenance expense, the wear and depreciation upon its mixer, and a profit above all these expenses upon its investment therein, the total sum of $75.00. How and when is this amount payable to the bidder? Under Par. 5 of Form S. P. O. No. 7, at the rate of seventy-five cents for each operating hour of the mixer, and when it has been actually operated for a total of 100 hours. If the bidder is to receive no payment for its mixer unless and until the Government actually operates it for 100 hours, does it not follow, indubitably, that the Government impliedly binds itself to use and operate the mixer for that number of hours? For if the

Government is not bound to use it, so that it may earn the $75.00, then the bidder's consideration for the contract can never become due and payable; there is a total loss to it not only of its transportation expenses and the use of the equipment, but of such margin of profit as there might be in the contract; the bidder is bound, and the Government is not, hence the contract is unilateral; the Government can derive no benefit under the contract without operating the mixer; the sole object of both parties in making the contract is defeated, and the entire contract, as to both, becomes purposeless, futile and meaningless.

The principle of implied promise here relied upon is stated by all authoritative text writers, and applied in almost numberless decisions of federal and state courts; and invariably, in these decisions, it is applied where the implied promise of one party to the contract is necessary to give the other party the consideration for his undertaking. In 6 R. C. L. §244, p. 856, 857, it is thus stated:

> "Necessary implication is beyond doubt as much a part of an instrument as if that which is so implied were plainly expressed. If it can be plainly seen, from all of the provisions of the instrument taken together, that the obligation in question was within the contemplation of the parties when making their contract, or is necessary to carry their intention into effect,—in other words, if it is the necessary implication from the provisions of the instrument—, the law will imply the obligation and enforce it * * *. Whatever may fairly be implied from the terms or nature of an instrument is in law contained in it. One who undertakes to accomplish a certain result agrees by implication to do everything necessary to enable him to perform his contract * * *.

> Whatever the law necessarily implies in a contract is as much a part thereof as if expressly stated therein."

Corpus Juris, §521, p. 558, states it as follows:

> "A contract includes not only what is expressly stated, but also what is necessarily to be implied from the language used; and terms which may clearly be implied from a consideration of the entire contract are as much a part thereof as though plainly expressed on its face."

And *Corpus Juris, Sec.,* §328, p. 778, 779, says:

> "In the absence of an express provision therefor the law will imply an agreement by the parties to a contract to do and perform those things that according to reason and justice they should do in order to carry out the purpose for which the contract was made, and to refrain from doing anything which will destroy or injure the other party's rights to receive the fruits of the contract."

Williston on Contracts, Revised Ed., §1293, p. 3683, says:

> "Wherever, therefore, a contract cannot be carried out in the way in which it was obviously expected that it should be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied."

This principle has been invoked and applied by the federal courts so frequently that only a few of the more outstanding cases may be presented to the court's attention. In *Dupont, etc., Powder Co.* v. *Schlottman,* 218 Fed. 353, on the sale of a fuse manufacturing plant

to the Dupont Company its president wrote a letter to the plaintiff's assignor, Grubb, saying that it was understood that if, after Dupont had had the property for a year, and manufactured fuse successfully, if in the judgment of the president it had been worth $175,000 to the company Grubb would be paid $25,000 in either bonds, preferred or common stock of the Dupont Company, as the latter would elect, in addition to $150,000 in Dupont stock, the purchase price. Dupont took over the plant, operated it for six months, and sold it to other parties, who dismantled it. Grubb's assignee sued Dupont for damages, alleging that Dupont, by selling the plant, wrongfully prevented the test agreed upon, on the success of which the payment of the $25,000 additional depended, and recovered $25,000 in the district court. Dupont appealled, and the circuit court of appeals affirmed the judgment, saying:

> "The letter does not contain any express promise to operate the plant for one year, and the question is whether such a promise is to be implied. We think the court below rightly held that it was. The law implies a promise on the Du Pont Company's part to operate the plant for a year, and that promise must be taken as part of the consideration for which Grubb sold the capital stock."

In *Diamond Alkali Co.* v. *P. C. Tomson Co.*, 35 Fed. (2nd) 117, it was held:

> "Contract providing for loan of money for construction of manufacturing plant which was to use certain raw materials furnished by lender for period of five years imposed an implied obligation on part of borrower to continue in business for period of five years, and buy its supplies from lender during such time, regardless of failure to expressly provide therefor.

> "Whenever a contract cannot be carried out in the way it was obviously expected it would be carried out without one party or the other performing some act not expressly promised by him, a promise to do that act must be implied."

In *Great Lakes, etc., Transp. Co.* v. *Scranton Coal Co.*, 239 Fed. 603, it was held that where plaintiff, a large shipper of coal on the Great Lakes, had contracted with the defendant, a shipowner, to transport its coal for three years, the contract carried with it an implied obligation of the defendant to continue its business during the term, and to run its ships in a reasonable manner in order to carry out its contract with the plaintiff; and that defendant would be enjoined from either selling the ships involved or removing them from the Great Lakes. The court, interpreting the contract, said:

> "There is no express provision that the steamers shall make any trips whatsoever, eastward or westward; there is no express provision that the trips, if and when made, shall extend as far east as Oswego (plaintiff's port of shipment); and therefore defendant contends that the obligation to carry coal westward is conditioned solely upon the transportation company's uncontrollable willingness to run the boats on Lake Ontario. If this be the sound construction of the agreement, the bill must be dismissed, for under such circumstances the court would not tie defendant's hands.
>
> But we cannot accede to these contentions or adopt this construction. The obligation to carry plaintiff's coal on all westbound trips, fairly interpreted in the light of the context and of the relations of the parties out of which the written agreement grew, carries with it the further implied obligation to run the boats * * *.

> "Precedent can throw but little light on the sound interpretation of such contracts, especially as to implied and unexpressed obligations: each has its own individuality, its own background and surrounding circumstances. Words are only symbols, and at times, even in the most formal agreement, but elliptical expressions of the mutual understanding; the underlying mutual intent sought by both parties to be clothed in the language used must be ascertained ° ° ° A bilateral contract of the nature here in question will not lightly be construed so as to give one of the parties a virtual option instead of imposing upon each of them obligations conditioned solely as they may have expressly agreed."

U. S. v. *A. Bently & Sons Co.*, 293 Fed. 229, was an action by the United States on a cost-plus contract for construction of an army camp. On the question of the right of the government to check defendant's books, for the purpose of verifying the cost of construction, not only during the work, but for two years after its completion, the court said, and held:

> "Considering the language of the compound sentence and the caption of the article, the required interpretation, to advance the object of the article and effect the design of the contracting parties, was that the government should have the right ° ° °, and not only as the work progressed, but for a period of two years thereafter. The government's right thus to verify and check up, if not affirmatively expressed, is at least necessarily implied, and what is implied is as much a part of the contract as what is expressed. 9 Cyc., 252, 282; 6 R.C.L. 856."

In *Wildman Mfg. Co.* v. *Adams Top Cutting Mach. Co.*, 149 Fed. 201, the appellate court sustained the

judgment of the trial court, and its holding that

> "Without any special provision in the contract to that effect, it is implied that the Wildman Company, having accepted the position of selling agent, and especially as being the sole selling agent, so that nobody else could put this machine on the market but itself, and to (was obligated to?) exercise reasonable diligence and care in endeavoring to market the machine."

In *Sacramento Navigation Co.* v. *Salz,* 273 U. S. 325, 71 L. Ed. 663, it is held:

> "Under a contract to transport grain on a barge having no power of its own, with the privilege of towing with a steamer, the use by the owner of its own steamer does not make its contract one of towage so as to deprive it of the benefit of the provision of the Harter Act, that if the owner of any vessel shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, neither the vessel nor the owner will be responsible for damages or loss resulting from faults or errors in navigation or in the management of the vessel.
>
> "A contract includes not only the promises set forth in express words, but in addition all such implied provisions as are indispensable to effectuate the intention of the parties, and as arise from the language of the contract and the circumstances under which it was made. 3 Williston on Contracts §1293."

And the court's opinion says:

> "Considering the language of the bill of lading in the light of all the circumstances, it is manifest that we are dealing with a single contract, and the use of the tug must be read into

> that contract as an indispensable factor in the performance of its obligations. To transport means to convey or carry from one place to another; and a transportation contract for the barge without the tug would be as futile as a contract for the use of a freight car without the locomotive. In this case, however, by the terms of the contract of affreightment, in part expressed and in part necessarily resulting from that which was expressed, the transportation of the goods was called for not by the barge, an inert thing, but by the barge and tug, constituting together an effective instrument to that end."

A very strong and well reasoned case in support of plaintiff's position as to the instant contract, and upon which it relied in both the trial and appellate courts as being closely analagous, in both substantive facts and principle, to that contract, as shown particularly by comparison with the applicable paragraphs of Form S. P. O. No. 7, is *Southern Ry. Co.* v. *Franklin, etc. ,Ry. Co.*, 96 Va. 693; 695, 697, 698, 699, 701, 702. There, one railroad company, in 1878, leased its railroad to the receiver of another railroad company for a term of thirty-four years. In 1897 the then lessee plainly manifested its intention to abandon and cease to operate the leased road, whereupon the lessor brought suit in equity to enjoin the lessee from doing so. The Supreme Court of Virginia, on appeal from a decree of the circuit court granting this injunction, and thereby requiring the lessee to continue to operate the road, said, in its opinion:

> "Is the defendant company bound to operate the leased road during the term of the lease, or may it rightfully abandon it and cease to operate it? This is the first question presented for our

determination. Its solution depends upon the provisions of the lease. * * *

* * *

It is apparent, upon a fair construction of the whole instrument, considered in the light of the circumstances under which it was made, that it was within the contemplation of the parties, and their intention, that the road should be maintained and operated during the entire term of the lease. And when we come to examine its provisions critically, the obligation to do ,so though not expressed in words, is plainly implied.

By the lease the Franklin company demised to John S. Barbour, receiver, its whole road * * *, including an equipment of rolling stock not to exceed in value $20,000.00, for thirty-four years * * *, and the receiver, in consideration of said demise, agreed to pay to the Franklin company an annual rental during the term of thirty-four years of a sum equal to seven per centum upon the amount of certain bonds which the Franklin company proposed to issue and secure by mortgage * * * not to exceed $100,000.00. He further covenanted to apply the receipts which might be derived from the property thereby demised as follows:

First: To the payment of the annual expenses of running the road and keeping it and the equipment in proper repair.

Second: To reimburse himself for the payment of the annual rent which he had agreed to pay for the use of the road.

Third: To the payment of a dividend of seven per centum upon the capital stock of the (lessor) company, provided the capital stock should not exceed in par value the sum of $200,000.00.

* * *

In the preamble to the lease there is also the declaration that the Franklin company, when completed, 'will be a valuable feeder to the traffic of the main line' of the Midland railroad.

The leased road could not be a 'feeder', valuable or otherwise, to the traffic of the main line of the lessee unless it was operated.

Neither would there be *annual* expenses of *running* the road, and of keeping it and the equipment in repair, nor *receipts* to pay them, unless the road was operated.

One of the obligations of the Franklin Company, as we have seen, was to furnish rolling stock and other equipment necessary to the 'use and enjoyment' of the road, not to exceed a fixed amount. The obligation to furnish the rolling stock and equipment for the *use* and *enjoyment* of the road implied the corresponding obligation to use it, and to use it was to operate the road.

By the terms of the lease the Receiver was to reimburse himself for the annual rental out of the receipts arising from the operation of the road, and provision was also made for the payment out of the receipts of a dividend to the stockholders.

The stipulations referred to plainly manifest an undertaking by the lessee to operate the road, and are inconsistent with the theory that it might, at its will and pleasure, abandon the road and cease to operate it. * * *

Our conclusion is that the obligation to maintain and operate the road during the term of the lease is a necessary implication from its expressed stipulations. It adds nothing to the written contract to infer an obligation to do what was actually intended by the parties, and what is essential to give effect and vitality to it."

Upon this reasoning the court held, in its syllabus:

> "Although courts are careful in inferring covenants and promises not contained in written contracts, yet what is necessarily implied is as much a part of the instrument as if plainly expressed, and will be enforced as such. If the language of the instrument leaves the meaning of the parties in doubt, the court will take into consideration the occasion which gave rise to it, the obvious design of the parties, and the object to be attained, as well as the language of the instrument itself, and give effect to that construction which will effectuate the real intent and meaning of the parties. In the case in judgment, it is manifest that the intention of the parties was that the railroad leased by the appellee should be maintained and operated by the lessee during the entire term of the lease.
>
> "A necessary inference from a written contract of an obligation to do what the parties actually intended, and what is essential to give effect and validity to it, is not an addition to the contract." (All emphasis the court's.)

The appellate court, in reaching the conclusion, from its construction of the one Paragraph 5, alone, of Form S. P. O. No. 7, that the Government was bound by no promise, express or implied, to use any of plaintiff's equipment involved, sought to distinguish the Government's obligation under the equipment contracts from that of the lessee in the *Southern Railway Case* by finding that

> "° ° ° the lessor transferred all of its property to the lessee for the *sole* purpose of enabling the lessee to operate the road. Thus the *actual operation* of the road was the main inducement and purpose of the contract, so that the lessee was

> under an *affirmative duty* to run the road. There were also several undertakings by the lessee, which seemed to imply an agreement by the lessee to operate the road for the time specified. The finding of an implied promise by the court, therefore, only made explicit that which was implicit. * * * There was imposed on the Government no *duty* to use the equipment, and the instant case is thus clearly distinguishable from *Southern Ry. Co.* v. *Franklin, supra.*"

Of course the railroad was leased for the *sole* purpose of enabling the lessee to operate it, and the *actual operation* of the road was the main inducement and purpose of the contract. And equally of course, as said above, plaintiff leased its mixer to the Government for the *sole* purpose of enabling the lessee to operate it, and the *actual operation* of the mixer was not only the main inducement and purpose, but the whole inducement and purpose, of the contract and of both parties thereto. What other conceivable purpose or inducement could either party to the contract have had? But this case, however often read, will not disclose any state of facts or any principle of law from which the court deciding it derived, or the reader may derive, any *duty,* affirmative or otherwise, on the part of the lessee, owing to the lessor, to operate the railroad, as distinguished from the contractual obligation of the lessee to the lessor to operate it so clearly and unmistakably found and enforced by the Virginia court. (See opinion, p. 701, 702). Out of the breach of certain affirmative duties imposed by law upon a railroad company may arise, and commonly arise, liability *ex delicto,* and in some cases both *ex delicto* and *ex contractu;* but in this case it was never contended, even by the lessee, that there was anything but a breach of contract, a necessarily implied promise

to operate the railroad, "making explicit that which was implicit"; and the lessee defended against the mandatory injunction requiring it to continue the operation of the road that the lessor's remedy was an action at law for damages, but the court held that the legal remedy was not plain, adequate and complete, each day that the road was not operated constituting a separate breach of the contract and necessitating an action and consequent multiplicity of suits.

2.

Contract No. 1, being prepared by and in the language of the Government, must be construed most strongly against it; and the construction given it by the Government's own officers should be followed and accorded great weight.

This contract, prepared by the Procurement Division on its regular form, and including the attached Form S. P. O. No. 7, must have been construed most strongly against the Government in case of a conflict between the parties as to its proper construction, but no such conflict ever in fact arose; to the contrary, there was complete agreement between plaintiff and the contracting and administrative officers of the Government as to its construction. Between the parties there was no abracadabra in the much mooted Par. 5 of the attached form. Both understood that the rental of seventy-five cents should be paid for operating time only, and not for every calendar hour the equipment was on the job, or at the rate of $18.00 per twenty-four hour day; in other words, that the rental was by the use hour, for 100 hours; that the number of hours the mixer was used, in the due course of construction of the project, would be kept by the time-keeper and reported to his imme-

diate superior; and when it had been used a total of 100 hours, the Procurement Division would be notified and would pay the lessee $75.00; and both parties further understood that this total of 100 hours use would be reached within a reasonable time, as a matter of fact, within less than a month, the minimum monthly use hours of like equipment then being 112. No officer of the Government, contracting or administrative, from the Chief Procurement Officer down to the foreman on the job, ever suggested any other construction of the contract, much less suggested that it was an "option" contract, or a "more or less" or "requirements" contract. When the contract was breached by the Government, Oliver, requisitioning engineer, offered to pay $65.00 in settlement of plaintiff's damages; the deputy state administrator, though the equipment had never been used, offered to pay $159.00, the original 100 hours rental at seventy-five cents plus $84.00, 112 hours additional rental, for a thirty day extension of the contract under Par. 6 of Form S. P. O. No. 7, if the Huntington office would recommend it; the Huntington office refused such recommendation, and made a counter offer of $130.00; when formal claim was made on the contract, Smith, deputy state administrator, recommended payment of $75.00; Downey, chief procurement officer, who signed the contract, reported in a formal statement to the General Accounting Office that "there is no question in the mind of the Procurement Officer but that *the contractor was damaged financially by reason of the Government failing to complete * * * the contract*", and that his office was ready to pay the entire claim of $300.00 subject to the determination of that office; and the General Accounting Office rejected the claim under the contract because it was a claim for damages for the failure of the Government to use the mixer, and the appropriation to

the Works Progress Administration did not provide for the payment of damages therefrom. There is thus presented the anomalous situation of a contract prepared by and in the language of the Government, and hence subject to strong construction against it, but in fact construed in the other party's favor by the Government, being judicially interpreted not only against the plaintiff intrinsically, but against the Government's extrinsic construction of it in plaintiff's favor, and consequently against its own interests.

Both of these rules of construction, ignored by the appellate court, were approved and applied against the interests of the Government seventy-five years ago, by this court, in the case of *Garrison* v. *U. S.*, 7 Wall. (U. S.) 688; 690, 692 (1868), involving a contract for army rifles, where there was a written contract, with a supplemental agreement prepared and signed by the Government's officer. The court held:

> "1. The supplemental agreement is signed by General Butler and not by plaintiff. Its doubtful expressions should, therefore, according to a well-known rule, be construed most strongly against the party who uses the language. * * *
>
> "3. This construction (the court's) was acted upon at the time by Major Strong, the officer at whose suggestion it was made, and who certified the account, and paid at that price for the first 2800 guns, and would have paid the same price for the others, but was forbidden by the Secretary of War."

And the judgment of the court of claims was reversed, with instructions to it to enter judgment for plaintiff for the difference between $20 and $27 each for the 3200 guns described in the second voucher.

This court again applied the first of these rules in the case of *Noonan* v. *Bradley*, 76 U. S. 394; 395 (1869), which was a suit upon notes, secured by mortgage, for the purchase money of land, in which defendant pleaded failure of title to the land as a complete defense, under a provision indorsed on the note or title bond by the plaintiff agreeing that on such failure of title the title bond (note) would not be enforced. The circuit court held against the defendant, but this court, construing the indorsement upon the title bond as a perpetual covenant not to enforce it if plaintiff's title to the land failed (as it eventually did), reversed the trial court, and held:

> "Where doubt exists as to the construction of an instrument prepared by one party, on the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter party; and where the instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—, that one should be favored which upholds the right."

The lower federal courts, needless to say, have heretofore followed this court's holdings in the last named two cases. In *U. S.* v. *A. Bently & Sons Co.*, 293 Fed. 229, the court, citing both, held:

> "Where the government makes a contract with an individual or corporation, it divests itself of its sovereign character as to such transaction, and its contract is governed by the same laws governing individuals, under like circumstances, and a contract in the language of the government's own officers is therefore construed most strongly against it."

And in the case of *U. S.* v. *Newport News Shipbuilding, etc., Co.*, 178 Fed. 194 (C. C. A., 4th Cir.), the court, quoting from and following the *Garrison Case*, and affirming a judgment against the Government, held:

> "The rule that a contract is to be construed most strongly against the party who prepares it applies to the United States with respect to its contracts with private parties."

But in the present case, it will be noted, this same court ignored, first, the decisions of this court, and, second, its own decision, upon the same question of law, arising upon not dissimilar facts.

Apparently doubtful of its own construction of this contract as an option, the appellate court was constrained to find that all three contracts were "nothing more than minor varieties of the familiar 'requirements' contracts" (familiar to whom it did not say), and to cite the case of *Brawley* v. *U. S.*, 96 U. S. 168, to sustain this conclusion. The most cursory examination of the contract and the facts in that case, and comparison with the immediate contract, will disclose their lack of any point of analogy. *Brawley* made a contract with the United States to deliver to an army post "880 cords of * * * wood, *more or less*, as shall be determined to be necessary, by the post-commander, for the regular supply of the garrison of said post" for one year. Before the contract was signed he cut all the wood, and hauled 55 cords to the fort, with the understanding that he assumed all risk regarding its acceptance. Four days after the contract was signed the post-commander learned of it, and notified Brawley that but 40 cords of wood would be required, and forbade his hauling any more to the Government yard; and the army post

did not in fact need more than the 40 cords accepted and paid for by the Government. By the mixer contract, the Government rented the use of plaintiff's equipmentl for 100 hours—not 100 hours, "more or less". The obvious distinction between the two contracts is this: In the *Brawley Case,* the post-commander was to determine, absolutely, how many cords of wood were necessary for the post's consumption, and were to be delivered, before it was delivered, and Brawley was to be paid accordingly; but the administrative officer in plaintiff's contract had nothing to do with determining the number of use hours for which the mixer was rented, this being determined by the contract itself, or the number of hours it was *to be operated,* but was only to perform the purely ministerial act of determining the actual number of hours it *was operated,* and reporting the fact to the Procurement Division, the paymaster under the contract.

3.

In both Contract No. 2 and Contract No. 3 the written provisions thereof dominate and control the printed provisions.

As to Contract No. 2, shovel, the law applicable to and decisive of the obligation of the Government under it is so plain upon the face of the instrument itself, and so long since settled beyond argument by the courts of highest authority, as to render its discussion almost a work of supererogation. The typewritten contract, as shown by the photostat copy of it in the record, is for the rental by the Government from the plaintiff of the shovel described therein for the fixed, definite period of three months, at the fixed, definite rental of $400.00 per month, and a total rental of $1,200.00; the plain-

tiff, for this consideration, to furnish and pay an operator of the shovel, and keep it in good repair, and WPA to furnish oil, gas and grease. It recites that "S. P. O. No. 7 is hereto attached and is made a part of this contract", and following this recital is the typewritten provision:

> "Time lost on account of machine being unable to operate due to its mechanical condition, or absence of the operator, may be deducted from this contract or equipment held enough additional time to make up for the time lost."

While Form S. P. O. No. 7 is made a part of the contract, Paragraph 5 thereof is not applicable to it, for the plain reason that the payment of the monthly rental is not conditioned upon the actual operating time of the shovel, but is made absolute, and there is nothing for the administrative officer under that paragraph to determine; and the only abatement or deduction from the monthly rental that may be made by the Government is under the special typewritten provision above quoted, completely controlling Paragraph 5 of the printed general conditions of rental, wherein the parties agree that in the event the Government loses operating time of the shovel either because of such a defective mechanical condition of it that it cannot be operated, or the absence of plaintiff's operator from the job, in either event it may do one of two things—deduct from the monthly rental the operating time so lost, or hold the shovel beyond the current monthly period in which the time is lost, and operate it without payment, long enough to make up the lost time. To the plaintiff, employing and paying its operator by the month, and bound to keep the shovel in good mechanical operating condition, either reason for abatement of the rent,

and the period of such abatement, would be as quickly and fully known as to the Government itself; it would be immediately called upon to repair the shovel or replace its operator, and to abate the monthly rent accordingly; and in the absence of cause for abating the rent neither party to the contract would have anything to determine except the day of the calendar month it became due. No degree of ingenuity can read into the contract an agreement by plaintiff to deliver this shovel at Kellogg, on the project, to the Government, furnish an operator for it, pay this operator $125.00 per month, straight time, keep him on the shovel for three months, subject to the orders of the Government's representatives on the job, and give the Government an option to operate the shovel, or not, as it saw fit; in the former event paying plaintiff the aliquot part of the monthly rental represented by the operating days, and in the latter nothing. The reason balks at such a proposition, and it would not even be presented here but for the initial statement of the appellate court's opinion that the same legal principles apply to each of the three contracts in suit, and its subsequent holding as to all three, which of course includes this contract, that plaintiff contracted "to make the equipment *available for use*, subject to the condition that the payment of rental fees would be made at the rate agreed upon in the contracts *only* for the actual operating time, *if* and *when* the equipment is used"; and that "accordingly the contracts give the Government the *right* to use the equipment and to pay for it at the specified contract rate *when* and *to the extent* used."

It was deemed unnecessary, in the discussion of this contract in plaintiff's original brief, to cite authority for the statement that the typewritten provision of the con-

tract as to the abatement of rent controlled and prevailed over the provision in Par. 5 of the printed Form S. P. O. No. 7; but in its brief in support of its petition for rehearing, the necessity for so doing seeming to have arisen, the appellate court's attention was called to this court's decisions, the decisions of other federal courts and state courts of last resort, and text authorities, as follows:

In *Thomas* v. *Taggart*, 209 U. S. 385 (1907), the Supreme Court held:

> "Where there is a repugnancy between the printed and written provisions of a contract, the writing is presumed to express the specific intention of the parties, and will prevail * * *."

And the court, in its opinion said:

> "It is a well-settled rule of law that if there is a repugnancy between the printed and written provisions of the contract the writing will prevail. It is presumed to express the specific agreement of the parties."

In *Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423 (1902), the court, construing a written provision of a marine insurance policy which had been given one effect by the district court, and another and different effect by the circuit court of appeals, and reversing the judgment of the appellate court and affirming that of the trial court, quoted and approved the language of the district judge, as follows:

> "The decision of the case depends upon the effect to be given to the words 'for whom it may concern'. This clause, so far as it may be in conflict with other language in the policy, must upon familiar principles be regarded as dominant. It

> expresses the special agreement of the parties, for it is in writing, while the conflicting provisions are in print; and general printed conditions usually give way to deliberately chosen written words."

And the Supreme Court itself said:

> "Where a marine policy is thus taken out upon the blank policy providing by many of its terms for insurance on property or goods on land, it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application. If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail."

And in *Sturm* v. *Baker*, 150 U. S. 312 (1893), *Mr. Justice Jackson*, considering a contract relating to firearms, upon the question of whether there was a sale or a consignment of the goods, said:

> "It is too clear for discussion, or the citation of authorities, that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consignee' employed in the letters were used in their commercial sense,

> which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other. The words, 'Mr. H. Sturm, in joint account with Hermann Boker & Co.', or 'Bought of Hermann Boker & Co., in joint account', in the bill-head, cannot be allowed to control the express, written terms contained in the contract as set forth in the letters. * * * The contract being clearly expressed in writing, the printed bill-head of the invoice can, upon no well-settled rule, control, modify or alter it."

See, also, to the same effect, *Deutschle* v. *Wilson*, 39 Fed. (2nd) 406; *The Addison Bullard* (C.C.A.), 258 Fed. 180; *Pierpont* v. *Pierpont*, 71 W. Va. 431, 76 S. E. 848, 849, 43 L. R. A. (N. S.) 783; Williston on Contracts, Revised Ed., §622, p. 1791; 13 Corpus Juris, §498, and cases cited.

Plaintiff's suit upon this contract was not for the rental of $1,200.00 which the Government agreed, absolutely, to pay it for performance, but for the profit it could have made if the Government had not by rejection of the equipment in violation of the contract prevented its performance. As in the case of the mixer contract, the contracting and administrative officers of the Government all recognized such wrongful rejection as a breach of the contract, and voluntarily and in writing admitted the Government's liability for damages. Downey, the contracting officer, stated that the plaintiff "was damaged financially by the failure of the Government to complete the contract", and was ready to pay its damage claim of $549.03 in full if the General Accounting Office would approve such payment; Smith, Deputy State Administrator, by letter, recommended to

the Procurement Division the payment of $400.00 in settlement of it; and the General Accounting Office rejected the claim under the contract for the sole reason that being a claim for damages for breach of contract by the Government no appropriation was available for its payment. Thus the appellate court, in its construction of this contract, again ignored, and at least indirectly failed to follow, not only this court's decision in the *Garrison Case* but its own decision in the *U. S. v. Newport News Shipbuilding, etc., Case;* not to mention its disregard of the decisions of the same question by other circuit courts of appeal brought to its attention.

As to Contract No. 3, this typewritten contract, as shown by the photostat copy of it in the record, is for the rental by the government from the plaintiff of the mixer described therein for a fixed, definite period of one month, at the fixed, definite rental of $84.00; the plaintiff, for this amount, to furnish repairs, and WPA to furnish operator, oil, gasoline and grease. Treating the contract, for the purpose of discussion, as reciting, though it does not, that "S. P. O. No. 7 is hereto attached, and is made a part of this contract", as in Contract No. 2 for the shovel rental, there follows this implied recital this typewritten provision:

> "Time lost on account of equipment being unable to operate due to its mechanical condition may be either charged aaginst this contract, or the equipment held enough time to make up for time lost."

Under this special, typewritten provision, completely controlling Par. 5 of Form S. P. O. No. 7, the only abatement of or deduction from the month's rental of $84.00 could have been in the event of "time lost on account of equipment being unable to operate due to its mechan-

ical condition", when the time lost might have been either charged against the $84.00 rent or the mixer held over the month "enough time to make up for time lost." This contract being the same, in essence, as the shovel contract, No. 2, the same reasoning and authorities apply to both, and repetition of them here is needless. Fortunately, plaintiff's actual damage from the clear breach of the Government's contract was only $9.18, the amount it paid for hauling the mixer to the Charleston project. This amount was all it claimed, and its claim was never questioned, and was recommended for payment by Davidson, the assistant engineer on the project, Smith, the deputy state administrator, and Downey, the Procurement Division officer who signed the contract for the Government, but was rejected by the General Accounting Office as being a claim for damages for breach of contract, not subject to payment out of the WPA appropriation; this rejection necessitating direct suit against the Government therefor. But although the contract provided, "Delivery required at once. * * * Equipment will arrive at destination within 3 days from receipt of contract. Delivery date will be one of the determining factors in making the award", the appellate court, holding it also to be an option contract, denied plaintiff recovery of even this trivial delivery expense.

II.

The contracts in suit, giving to all the provisions of each their natural, obvious meaning, were fair, customary and rational, and such as prudent men would naturally execute; but the appellate court, by giving to a single provision common to all three a curious, hidden sense and meaning, made all three unusual, improbable, harsh and unjust, and such contracts as no prudent contractor would make with the Government or any one else.

In the last analysis, this case turns upon the forced, strained and unnatural construction given by the appellate court to the language of Par. 5 of Form S. P. O. No. 7, in order to justify its conclusion that regardless of all their other provisions the language of this one paragraph of a printed form made all three contracts mere options to the Government to use the equipment, by which plaintiff knowingly and expressly bound itself to all of their provisions, while the Government was not bound by any of them. The isolated paragraph, by the express terms of the form of which it was a part, had no application whatsoever to Contracts 2 and 3; but the appellate court, regarding all three as "minor * * * contracts", and, perhaps, not to "take more than one bite at a cherry", nevertheless did apply it to them, and lumped all three contracts together as being options and "requirements" contracts so far as the Government's obligation thereunder was concerned.

It is elementary, of course, that a court, given for interpretation a written contract fairly susceptible of two constructions, one making it fair, customary, and such as prudent men would naturally execute, and the other making it inequitable, unusual and such as prudent men would not be likely to enter into, must prefer the interpretation which makes it a rational and probable agreement to that rendering it an unusual, unfair or improbable contract. Williston on Contracts, Revised Ed., §620, pp. 1786, 1787, states this principle as follows:

> "An interpretation which renders the contract valid, and its performance possible, will be preferred to one which makes it void, or its performance impossible or meaningless."
>
> "An interpretation which makes the contract or agreement fair and reasonable will be pre-

> ferred to one which leads to harsh or unreasonable results."

In *Pressed Steel Car Co.* v. *Eastern Ry. Co. of Minnesota,* 121 Fed. 609, it was held:

> "The intention of the parties must be deduced from the entire agreement, and not from any part or parts of it; because where a contract has several stipulations, it is plain that the parties agreed that their intention was not expressed by any single part or stipulation of it, but by every part and provision in it considered together, and so construed as to be consistent with every other part."

And the opinion, at page 611, said:

> "Where the language of an agreement is contradictory, obscure or ambiguous, or where its meaning is doubtful, so that the contract is fairly susceptible of two constructions, one of which makes it fair, customary, and such as prudent men would naturally execute, while the other makes it inequitable, unusual, or such as reasonable men would not be likely to enter into, the interpretation which makes it a rational and probable agreement must be preferred to that which makes it an unusual, unfair or improbable contract."

And the circuit court of appeals, in this case, giving the agreement involved an interpretation which made it a rational and probable agreement, said it was consequently unnecessary to consider the car company's assignment of error that the car company's evidence that the parties themselves had construed the contract as the appellate court had interpreted it had been rejected by the trial court.

In *Hawkeye, etc., Assn.* v. *Christy,* 294 Fed. 208, Sanborn, J., construing an insurance contract, said:

> "The natural, obvious meaning of the provisions of a contract should be preferred to any hidden, curious sense which nothing but the exigency of a hard case, and the ingenuity of a trained and acute mind, would discover."

And in support of this holding he cited *Delaware Ins. Co.* v. *Greer,* 120 Fed. 916, 921, where it is said:

> "Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their terms is not to be discarded for some curious, hidden sense which nothing but the exigency of a hard case, and the ingenuity of an acute mind, would discover."

This court, in *U. S.* v. *Purcell Envelope Co.,* 249 U. S. 313, 63 L. Ed. 620, in no uncertain terms registered its disapproval of such a construction of the Government's obligation in that case as the appellate court has given that obligation here, particularly in its application to Contract No. 2, for rental of the shovel. In that case the court, affirming an award of damages to the plaintiff below on the Government's appeal, held:

> "A contract to furnish the stamped envelopes and newspaper wrappers that the contractor may be called upon by the Postoffice Department to furnish for four years will not be construed, for the purpose of measuring the damages caused by the repudiation of the contract by the Department, as calling only for such quantities as the Department should see fit to order from the contractor, without reference to the quantities needed,—especially in view of the haste of the Department after its repudiation of the contract

to declare an emergency in its need, and to enter into a contract with others for such envelopes and wrappers."

Upon this point the court said, at page 625, L. Ed.:

"There are other contentions of the government which we may pass without comment except one, which it submits upon a supplemental brief. It is addressed to the rule of damages adopted by the court of claims and argues that it was erroneous, based on the theory, as it is asserted, that the Envelope Company 'had a contract which entitled it to furnish all the stamped envelopes and wrappers of the sizes mentioned in the specification, which the Postoffice Department *should need* (italics counsel's) during the four years' contract.' This is denied, and it is said, quoting the contract, that the Envelope Company was only to 'furnish and deliver promptly and in quantities as ordered,' the envelopes and wrappers 'that it may be called upon by the Postoffice Department to furnish during the four years.' It is difficult to treat the contention seriously. There is something surprising in the declaration that a contract to supply a great department of the government with envelopes and newspaper wrappers which it might need for a period of four years, at a cost of nearly two and one-half million dollars, bore but scant obligation upon the part of the government; or, to be precise and in the language of counsel, that the Envelope Company 'could not have forced the giving of orders (by the government) in excess of fifteen days' supply,' and that this was the extent of the government's obligation. And the further contention is, that the obligation being thus limited, the damages the Envelope Company was entitled to were, at most, 'the expenses incurred in getting ready to per-

> form the contract, and the profits it would have derived from the manufacture and sale' of such fifteen days' supply,—and that all else was expectation and cannot be capitalized by the Envelope Company and made the basis of profits and the responsibility of the government. If the contention be more than dialectical we may express wonder that it was not given prominence in the court of claims, and that in this court it was reserved for the afterthought of a supplemental brief. The further answer may be made that the contract of the Envelope Company was not so dependent as urged, and that its expectation was substantial is evidenced by the haste of the Department, after the revocation of the contract, to declare an emergency in its need and enter into a contract with other companies."

A case in which this rule of interpretation was properly applied, and the contract, one for personal services, given a construction making it a reasonable and equitable instead of an unconscionable agreement, is *Coghlan* v. *Stetson,* (C. C.), 19 Fed. 727. The facts were these:

Coghlan, an English actor, was employed by Stetson under a written contract to play at defendant's New York theater for a season beginning October 8th, 1883, and ending May 3rd, 1884, with the option to Stetson to continue (extend?) the contract for six weeks. Plaintiff Coghlan was to play seven performances each week, but where customary to play more performances, and Stetson agreed to pay him $100 "for each performance *in which he shall appear*". Plaintiff played, beginning October 8th, until November 10th, five weeks, and on that day was informed that his services would not be required for an indefinite period. Plaintiff protested, and notified the defendant of his entire willingness to

play, and that if prevented, and he remained idle, he would insist upon being paid at the rate of $700 per week. He was not permitted to play for three weeks. Subsequently he instituted suit to recover, and did recover, $2,100.00, the salary for three weeks. The defense of Stetson was,

"(1) That plaintiff did not 'appear' during the three weeks period, and the defendant was not required by the contract to permit him to appear * * *; (3) the defendant does not agreed to employ the plaintiff; the agreement is by the plaintiff alone to render services for the defendant; and (4) that in any event the complaint is defective, the action should have been for damages."

The court, in its opinion finding judgment for the plaintiff, says:

> "The principal controversy arises upon the construction of the written contract, and must be determined by that instrument alone. The interpretation contended for by the defendant is so harsh, so unfair, so wanting in reciprocity, that the court should not hesitate to reject it provided the instrument is susceptible of any reasonable construction. According to the defendant no obligation rests upon him to do anything. The plaintiff, on the contrary, * * * is required to leave his home and his profession there (England), cross the Atlantic at his own expense, pay his board in this country from September 24th until May 3rd, and possibly for six weeks thereafter, furnish his own costumes, remain at the beck and call of the defendant for seven months, and refuse all other employment. To all these the plaintiff is bound, and the defendant is not bound at all. In other words, the plaintiff must cross three thousand miles of ocean, lose time,

money and reputation, and if it suits the fancy or whim of the defendant to put some other actor in his place he is wholly remediless, he cannot compel the payment of a single dollar. The charge that this interpretation is severe is not strenuously denied by the defendant, but he insists that the contract was one which the plaintiff was at likerty to make, and having made it he must abide the consequences. Undoubtedly this is so. If the plaintiff made such a contract he cannot recover. But whether he made it or not is the precise question involved. If the language used clearly establishes the defendant's version it would unquestionably be the duty of the court to enforce it. But where the exact meaning is in doubt, where the language used is contradictory and obscure, if there are two interpretations, one of which establishes a comparatively equitable contract and the other an unconscionable one, the former construction should prevail. In such cases the court may well assume that the parties did not intend that which is opposed alike to justice and to common sense. Unless the language is so definite and certain that no other interpretation can be upheld, a construction should not be adopted which must inevitably cast a reflection upon the sanity of one of the contracting parties. * * *

"The objection that the defendant does not agree to employ the plaintiff has already been disposed of. If it were necessary the law would imply an agreement to employ him during the stipulated period, the plaintiff having entered upon the discharge of his duties under the contract and rendered services for the defendant which were accepted by him. But there is here an express agreement. The contract is not unilateral. The one party agrees to act and the other agrees to pay."

The objection to the plaintiff's action that in it he sought to recover a sum of money as wages which he should recover as damages, was held by the court to be formal and technical, and plaintiff was allowed to amend his complaint, upon which amendment he received judgment for the full amount demanded.

Yet in interpreting the obligation of the Government under its Contract No. 1, for mixer rental, upon a state of facts calling for the application of the same salutary principle of construction followed in the *Coghlan Case,* the appellate court has taken one printed form, titled "Standard Conditions of Equipment Rental", and nothing more nor less than the general specifications for the performance by both parties of the actual contract as typewritten on Form 33 (Revised), and upon its face made a part of this substantive, dominant, typewritten contract only "so far as applicable" thereto, as wholly determining the extent of the Government's liability under the contract in its entirety. This paragraph providing that the rate of *rental* agreed upon—here seventy-five cents per hour—shall apply to actual *operating* time only—which is all the plaintiff ever claimed it was to be paid for, no claim, of course, ever having been made that the Government was to pay it seventy-five cents per hour for every calendar hour the equipment was on the project, or at the rate of $18.00 per twenty-four hour day,—and that the number of hours the mixer was operated should be determined by the administrative officer of the Government on the project,—as this fact must have been determined, the equipment owner being fifty miles away, and the Government, only, having access to this information, and necessarily doing the bookkeeping upon the project—, the court, solely upon the wording of an excerpt from the one paragraph, and

disregarding all the other provisions of the contract, read as a whole, has found, assuming such finding to be predicated upon all the facts, as shown by the record and agreed to be undisputed, that plaintiff, presumably, at least, a reasonably prudent contractor, went into the market and purchased a new magneto, the most expensive part of the equipment of its mixer, fueled it, paid its superintendent for testing its mechanical condition, transported it by truck fifty miles, at a cost of $9.18, and delivered it at West Hamlin, on the WPA project, with the knowledge that its return transportation cost would be the same, all under and in performance on its part of a contract by this one isolated term of which the United States government was given the uncontrollable option to retain exclusive possession of the mixer, even as against the plaintiff, upon its public work until that work was completed, and to use it or not, as it saw fit, but was not bound to use it, or pay for it, for a single hour; and under which option, even if exercised, and the mixer operated by the Government, "the total value of the contract" (R. 18) to the plaintiff could have been only $75.00, with a net profit to plaintiff of not to exceed $30.00. So construed, the plaintiff took the risk, without a dollar of consideration therefor, of the total loss of its transportation expense, the loss of possession of the mixer for an indefinite period (actually over four months), during which it might have been, and in fact could have been, rented at a profit upon other WPA projects, and the loss of such margin of profit as there might have been in the contract, to which profit it looked to reimburse it for the new equipment purchased for the mixer; the plaintiff was bound, yet the Government was not; the Government could derive no benefit under the contract without operating the mixer—certainly none from having it stand idle upon the work;

and the entire contract, as to both parties to it, was *ab initio* without effect or vitality,

> "* * * a tale told by an idiot, full of sound and fury, Signifying nothing".

Yet the appellate court holds that a construction of this paragraph excerpt in accordance with the construction given it by both parties to the contract, that the Government did agree and bind itself to lease the mixer for 100 use hours, to use the mixer for 100 hours, and to pay plaintiff for so using it, at the rate of seventy-five cents per hour, the total sum of $75.00, "the total value of the contract", would be "a legal solecism" on its part; thus showing more concern for grammatical punctilio than for this court's admonition in *Noonan* v. *Bradley, supra,* that

> "Where doubt exists as to the construction of an instrument prepared by one party, on the faith of which the other party has incurred obligations or parted with his property, that construction should be adopted which will be favorable to the latter party; and where the instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which upholds the right."

All in all, there is but one conclusion of the appellate court's opinion, in its quality of understatement almost amounting to a Briticism, that its devastating construction of these contracts "may seem harsh, at first blush", with which plaintiff can agree. Such construction is not only harsh at first blush, it is harsher at second blush, still harsher at third blush, and becomes progressively harsher at each succeeding blush, and so on

ad infinitum, until a point is reached at which, in an other connotation of the word, the question of who should do the blushing inevitably arises. Here the court has taken three written contracts for the rental of heavy road construction equipment, the contracting parties to which must be presumed to be, at the least, of ordinary prudence and intelligence, each one clear, precise and definite in all its terms, and fair, customary, reasonable, and such as prudent men would naturally execute, and by a feat of juridical legerdemain—for nothing short of this could convert a gasoline shovel into eight tons of ice cream before the very eyes—, has produced three contracts the like of which "never was on land nor sea", that no contracting officer for the Works Progress Administration or any one else in the construction business ever heard of, much less made,—each an option to the Government to use the equipment, under which the plaintiff, after the expenditure of around four hundred dollars in replacements, repairs, labor and delivery costs upon all of it, took the risk that the Government would use any of it at all, and pay anything whatsoever for such use. This interpretation, the court will bear in mind, is not only not that of the contracting officer of the Government, it is directly contrary to his interpretation and that of the executive officers of Works Progress Administration, all of whom are on record, in writing, as to such construction; and these statements in writing, made within the scope of their authority and against interest, are to be given the highest probative value of any form of evidence. It is the appellate court alone, therefore, which has given these contracts, severally and collectively, a construction "so harsh, so unfair, so wanting in reciprocity and altogether unconscionable", as

"• • • to be opposed alike to justice and to com-

mon sense, and which must inevitably cast a reflection upon the sanity of one of the contracting parties."

The injustice to plaintiff worked by such construction is of relatively minor importance, and but incidental to the main consideration upon which its review is asked,—that in reaching it the appellate court, as shown above, has completely ignored the decisions of this court laying down rules for the construction of Government contracts with private individuals by the only courts having jurisdiction of such contracts, the federal courts themselves; and going still farther, has even refused to follow its own decision of the same question.

III.

Under the uncontradicted facts, in the case of the mixer involved in Contract No. 1, there was a taking of plaintiff's private property by the Government without just compensation therefor, in contravention of the Fifth Amendment to the Constitution.

Plaintiff delivered this concrete mixer, in performance of its rental contract with the Government, to the project designated in the contract on September 23rd, 1935, paying the expense of such delivery as it agreed to do in the contract. The employees of the Government in charge of the construction of the project knew when the mixer was delivered and accepted that it had been requisitioned in error, *i. e.*, that the Procurement Division had been requested to rent it and send it to the project when in fact no such equipment was required there; that it would never be needed, and of course would never be used. Nevertheless, following its delivery and acceptance, it was held on the work until

January 29th, 1936, over four months, when by letter in response to plaintiff's inquiry, a month earlier, as to rental payment, plaintiff was told by the district supervisor that it had not been used "on account of adverse weather conditions", would not be needed for about sixty days, and might be removed from the work, and the Government would pay the cost of removing it. The statement that the mixer had not been used on account of bad weather was false on its face, the weather for nearly three of the four months following its delivery to the Government having been almost ideal for concrete construction; and plaintiff, knowing this, promptly investigated the matter, and found that the mixer had been requisitioned in error in the first instance, had never been needed on the work, and of course had never been used or intended to be used thereon, and so wrote the officials of Works Progress Administration in charge of the project. When efforts to settle its claim with them met with failure, plaintiff set out these facts in a sworn petition to the state administrator of WPA, exhibiting with its petition all of the correspondence on the subject, and when suit became necessary upon the contract made this petition, and the exhibits therewith, a part of its verified complaint in the suit. None of these facts, or the necessary implication therefrom, was ever denied by any one having any connection with the transaction as agent or representative of the Government, and no other excuse for or explanation of the conduct of these Government agents in holding the equipment on the work under these circumstances without notice to the owner that it was neither being used or to be used, was ever offered plaintiff. Plaintiff sued for the fair rental value of its mixer for the four months period, taking the monthly rental value of $75.00 then being paid by the Government for like equipment as the measure of

such value. The officer who signed the contract for the Government confirmed the plaintiff's statement that the mixer had been rented to the Government and held unused for this period; reported that plaintiff had been damaged financially by the failure of the Government to complete its contract, and might have rented the mixer for use on other WPA projects if it had not been held idle by the Government at West Hamlin; and that, subject to the approval of the General Accounting Office, he was ready to pay plaintiff, as damages, the full amount of its claim, though, the equipment not having been used, he was not authorized to pay rental for it. In other words, the contracting officer of the Government, giving to the language of the contract which he prepared and executed its natural, obvious meaning, treated it as being what it actually was, an agreement by the Government to rent the equipment by the use hour for 100 hours; to use it for that number of hours, and to pay at the contract rate for its use; and when the Government failed to use it—"to complete the contract"—, he considered such failure to be a breach of the contract, entitling the other party to damages, the measure of which was the rental income lost "that might have accrued should the equipment have been either used by the Works Progress Administration or surrendered to the possession of the claimant". (R. 11). This common sense treatment of the contract presupposed, of course, that it meant what it said, and that the Government intended to use the mixer for 100 hours at the least, and if the concrete work for which it was to be used was not then completed, to extend the lease for thirty days or less until its work was completed; that is, that the only "option" the Government had was under Par. 6 of Form S. P. O. No. 7 (R. 8), to extend the rental period, at the same hourly rental, *after the*

equipment had been used 100 *hours.* Certainly, when the requisitioner at West Hamlin was in such urgent need of it that the contracting officer specified in the contract "Delivery required immediately", this officer assumed that it was to be used, and its use commenced as soon as it could be delivered on the work, and he consistently acted upon this assumption throughout the entire transaction. The appellate court, however, construed the contract to be an option to the Government to use the mixer or not, as it saw fit, and held that as the Government was not bound to use it there was no breach of its contract; that as it had not used the mixer it had received no benefit under the contract, and consequently owed plaintiff nothing thereunder; and further held that there was no evidence in the record before it to show that the Government did not act in good faith in failing to use the equipment. (R. 35). Upon the undisputed facts, even if the contract could be construed as an option, under which the Government, in good faith, took possession of the mixer with the right to use and the expectation of using it, to some extent, at least—for there could be no good faith in taking it with intent never to use it at all—, the taking of it with knowledge on the part of the requisitioning agents of the Government, at the time of taking, that it never would be used, and the withholding from the owner of this knowledge, and the possession of the equipment, for more than four months, was not a taking of it under the written contract, but a tortious taking of it, for which the owner was entitled, under the Constitution, to just compensation, measured by the rental value of it to the owner for the four months it was held by the Government, and not by its value to the Government; the detriment to the owner, not the benefit to the Government, being the basis of the implied promise of the Government to make

just compensation for the tortious act of its agents, as upon a fictional contract implied in fact, and in order to avoid an admission of the tort. *Hudson Navigation Co.* v. *U. S.*, 57 Ct. Cl. 411; *U. S.* v. *A Certain Parcel, etc.*, D. C. Ga, 1942, 44 Fed. Supp. 712; *O'Reilly De Camera* v. *Brooke*, D. C. N. Y., 135 Fed. 384; *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 659; *Hill* v. *U. S.*, 149 U. S. 593; *Langford* v. *U. S.*, 101 U. S. 341; *U. S.* v. *Lynah*, 188 U. S. 446. This taking of plaintiff's private property by the Government, without just compensation, in contravention of the Fifth Amendment to the Constitution, was duly called to the attention of the appellate court, which by its refusal of a rehearing of its decision and judgment by implication, at least, refused to hold that there was such a taking, with the consequent right to compensation. This decision, it is submitted, is not sustained by the facts, is contrary to the decisions of this court upon the question at issue, and involves the construction of the Fifth Amendment, and for all these reasons should be reviewed by this court.

IV.

Instead of relieving the Government from the payment of an unjust claim, the appellate court's decision puts the Government, against its will, in the position of refusing to pay a just and admitted obligation.

The evident purpose and intent of the Tucker Act was to give to persons having claims against the United States for comparatively small amounts the right to bring suits in the courts of the United States in districts where they and their witnesses reside, without subjecting them to the expense and annoyance of litigating in a court located at Washington. *New York, etc., Steamship Co.*

v. *U. S.*, 202 Fed. 311, 312. Plaintiff, availing itself of the right given and the remedy provided by the act, sued the Government in the federal district court of its residence for damages for the breach of three contracts for the rental of construction equipment to the Works Progress Administration, the aggregate of its damage claimed under all three being less than nine hundred dollars. The officers of the Government who executed these contracts, and its executive administrative agents charged with performance of the Government's obligations under them, all construed the contracts as contracts of rental, recognized its obligation under them to use the rented equipment, admitted the breach of this obligation and the damage to plaintiff caused by such breach, and were ready to pay and offered to pay these damages; and would have paid them but for the ruling of the General Accounting Office of the Treasury Department that plaintiff's claims being for damages for breach of contract, and Section 3678, Revised Statutes, requiring appropriations made for the various branches of expenditure in the public service to be expended solely for the objects for which they are respectively made and for no others, and the appropriation to Works Progress Administration not providing, expressly or by implication, for the payment of damages therefrom, damages could not lawfully be paid from such appropriation. R. 59, 60, 61. In the suit necessitated by this admittedly correct ruling, the appellate court held that the contracts were not rental contracts, but were options given to the Government to use the equipment; that the Government was not bound to use it, had not agreed to pay rental for it, and had not breached any of the contracts; and that to give the contracts the construction given them by both plaintiff and the contracting and executive officers representing the Government in the prem-

ises would be "a legal solecism, in that it would force the Government to pay for the use of something it had not enjoyed, and for which it had not agreed to pay." The appellate court's opinion does not give its own construction of the contracts any particular designation; but whatever that construction might be or could be called—and a number of designations of it leap to the mind—, while it purports to relieve the Government from paying for something for which it did not agree to pay, it actually puts the Government, against its will as expressed by its duly authorized representatives, in the equivocal position of refusing to pay its just obligations in an amount the very smallness of which makes this refusal the more embarrassing. For the Tucker Act, in both letter and spirit, is primarily and peculiarly intended, as said above, to safeguard the interests of the small suitor against the Government; the smaller the amount involved the higher being the duty of the court to protect his interests. The opinion of the appellate court does not disclose this unhappy result, for the reason that nowhere therein is there even a hint that representatives of the Government gave any construction, of any character, to the contracts in suit and the Government's obligation thereunder, much less of the factual construction actually given such contracts by these Government representatives. Whatever the explanation of this omission, the effect of it is to ignore a state of facts the disclosure of which must have made the appellate court's conclusion of the nonliability of the Government wholly untenable, and at the same time render its opinion comparatively innocuous upon a casual reading. It is submitted that in seeking to exempt the Government from the performance of an obligation it had every will and desire to perform, the appellate court has done the Government a distinct disservice, in that the result of

the decision is to bring the United States into contempt, and to prejudice it in its future contract relations with its citizens. As so eloquently expressed by Judge Learned Hand, in *Hiel* v. *U. S.*, 273 Fed. 729, 731:

> "Whatever be the justification in policy of the sovereign's immunity, the first consideration should be this: That in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act (this paragraph) meant to avoid such consequences".

It is not of great importance, even to the plaintiff, that it has been denied its remedy under the act other than the bare remedy of suit; but it is important that a decision holding such potentials of injury to the Government's own interests should be reviewed by this court, in the exercise of its power of supervision of the lower federal courts, and the question of whether the Government's contracts are to be interpreted by the federal courts, in which, alone, it is suable, the same as those between individuals, definitely settled and set at rest by the highest judicial authority.

The court, in the consideration of this application, is respectfully asked, before reading either petition or brief, to examine the original, photostat copies of the

three contracts in suit. None of these contracts being in the printed transcript of the record, because their type format made their printing infeasible, it has been found necessary to devote a large part of both petition and brief to a description of each of them and quotation of its pertinent provisions which a brief glance at the contract itself would have made unnecessary; the consequence being to make the petition and brief perhaps double the length they would have been otherwise. The court may be moved to condone this consequence upon reflection that whatever the length of the two documents, in the first place, like the appellate court's conclusions as to plaintiff's equipment, they are only made available to it for reading, and the court is not bound to read either of them, or any part of either of them, having an uncontrollable option in this respect; and in the second place, no matter how tiresome it may be to read them, the task of writing them during the hottest part of the summer was not only unavoidable but immeasurably more irksome.

CONCLUSION.

Upon the whole case it is submitted that for the foregoing reasons the several questions which this application suggests should be definitely settled by this court.

Respectfully submitted,

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